

¹ Geneva Convention Common Art. 2 states: “[i]n addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”

maximum amount of damage to civilians and to cause the maximum amount of unnecessary suffering to their targets. This is one reason we call al Qaida operatives terrorists, not soldiers. As a matter of law, LOAC does not apply to our operations against al Qaida.

3. What law does apply to operations against al Qaida?:

As shown above, the LOAC does not apply to United States' operations against al Qaida. We may label these military operations several ways. We can call them military operations other than war. We can call them counter-terrorist operations. But certainly, they are not an "armed conflict" as that term is defined by the LOAC. This is because under the LOAC, an "armed conflict" can take place only between two State parties (an international armed conflict) or between a State party and an organized rebel group within that State's territory (an non-international or internal armed conflict).²

Because al Qaida is neither a State entity nor an rebel group operating within United States territory U.S., operations against al Qaida in 2000 and 2001 in Afghanistan was not an "armed conflict" under the LOAC. That is not to say, however, that the United States government did not have the authority under international law to use military force against al Qaida in Afghanistan, it certainly did have that right. However, that right did not flow from the LOAC, it flowed from the Art. 51 of the United Nations Charter (Art. 51 UNC) which allows States to defend themselves against "armed attack."

Under Art. 51 UNC, if a State is the subject of an "armed attack" by another State, a rebel group within its own borders, or outside non-State organization (like al Qaida), the State may use force, including military force to defend itself against that "armed attack." Al Qaida had made several armed attacks against the United States in the years leading up to 11 September 2001. Al Qaida attacked our embassies. It attacked our warship, the USS Cole. Al Qaida operatives bombed the World Trade center in 1993. And finally of 11 September 2001, al Qaida operatives destroyed the World Trade Center, and attacked the Pentagon. Each of these attacks was an "armed attack" under Art. 51 UNC. Once attacked, the right of self-defense kicks in, and the State that was attacked has a continuing right to defend itself.³

When a State is subject to an armed attack by another State and the State that is attacked exercises its right of self-defense under Art. 51 UNC, an international armed conflict may result, and the LOAC would apply to govern the conduct of the States armed forces during that conflict. If attacked by a rebel group operating within that state, a non-international armed conflict may result. If attacked by a non-state organization, such as al Qaida, the attacked State may defend itself with military force, but the LOAC does not apply. The laws that apply are the laws that the State must adhere to all the time—its own domestic law, including treaties, international conventions, and other recognized customary international law.⁴

² See Common Article 3 1949 Geneva Conventions.

³ See Art. 51 U.N. Charter.

⁴ U.S. government policy is that the United States Armed Forces will conduct all operations in which the use of military force is applied in a manner that complies with the principles of the LOAC. This policy does not mean that as a matter of international law, the LOAC is applicable or binding on the United States

4. Ongoing U.S. Operations against Taliban Forces in Afghanistan

The government also asserts that it may continue to hold Mr. Hicks pursuant to the LOAC because currently “. . . the United States is engaged in an armed conflict the Taliban.” (Government response p. 2) This statement is true to the extent that there is currently an armed conflict going on in Afghanistan. However, it is an internal armed conflict. The LOAC rules that allow a State to detain enemy combatant until the end of hostilities do not apply to internal armed conflicts.

The United States is currently engaged in combat operations against what are apparently former Taliban regime personnel in Afghanistan along its border with Pakistan. These military operations do not constitute an international armed conflict. Under the LOAC, the international armed conflict the United States was involved with in 2001 and early 2002 has ended. In October 2001, the United States exercised its right of self-defense under Art. 51 UNC against Afghanistan after its government, the Taliban regime, refused to surrender Usama Bin Laden and other al Qaida operatives operating in Afghanistan. The United States, along with a coalition of other nations and armed Afghani groups known as the Northern Alliance conducted military operations in Afghanistan.

This was an international armed conflict. All the rules of the LOAC that govern armed conflict between two State entities were in play. The United States could capture and detain enemy combatants, and could hold them until the armed conflict ended, at which time they should have been released, repatriated, or tried under appropriate law.

The international armed conflict in Afghanistan ended with the collapse of the Taliban regime and the creation of a new government under Mr. Ahmed Karzai called the Transitional Islamic State of Afghanistan (TISA). The TISA is the recognized government of Afghanistan.

Under the LOAC the ongoing U.S. combat operations in Afghanistan are not a continuation of the 2001-2002 international armed conflict against the former government of Afghanistan, the Taliban regime. The Taliban regime, the former government and state entity of Afghanistan no longer exists. That international armed conflict ended with the creation of the predecessor government to the TISA, also headed by Mr. Ahmed Karzai. The ongoing U.S. combat operations in Afghanistan against former Taliban regime personnel may best be characterized as combat operations in support of an internal armed conflict between the TISA and an armed rebel group consisting of former Taliban regime personnel. While the LOAC applies to such a conflict, the rules governing such a conflict are set forth in Common Art. 3 of the Geneva Conventions.

Common Art. 3 requires that the United States turn over to the host nation all rebel group personnel captured by U.S. forces during combat operations to the host nation, in this case the TISA. The TISA may then deal with them under its domestic law. The personnel of the rebel group do not enjoy combatant immunity, so they may be

during all its military operations. The LOAC only becomes binding on the United States Armed Forces during international armed conflict. In cases where U.S. forces are supporting a host nation government during a non-international armed conflict, the rules set forth in Common Art. 3 are binding on U.S. forces.

prosecuted by the host nation for criminal acts they engaged in during the internal armed conflict.⁵ The host nation, however, is constrained by its own domestic law, including the treaties to which it is a party, and customary international law to comply with procedural rules in prosecuting rebel personnel. The United States has no role in this process.

5. Application to Mr. Hicks

The government has asserted that in 2001, Mr. Hicks was an al Qaida operative fighting in Afghanistan. It is also possible that Mr. Hicks may simply have been a foot soldier operating under the direction of the Taliban regime. Either way, the provisions of the LOAC that allow for enemy combatants to be held without trial until the end of hostilities does not apply. The law that applies to Mr. Hicks is the domestic law of either the United States, or TISA, and all the accompanying treaties and recognized customary international law that goes with it.

As stated above LOAC does not apply to operations against al Qaida. Thus, if, as the government asserts, Mr. Hicks was an al Qaida operative, it may not hold him under the LOAC until the “end of hostilities” because that rule of the LOAC does not apply.⁶ They must deal with Mr. Hicks under U.S. law. Moreover, because the international armed conflict has ended, the U.S. should have released, repatriated, or taken timely steps to prosecute Mr. Hicks. Since it appears the government has chosen to prosecute Mr. Hicks, it must abide by U.S. law in doing so. The question is what U.S. law applies. The defense asserts that the provisions of the ICCPR and Additional Protocol 1 apply to Mr. Hicks case, and the government has failed to abide by them.

The government could have chosen any one of a number of forums in which to try Mr. Hicks, including the federal district courts or the military justice system.⁷ A trial of Mr. Hicks in either of these forums would likely have met the procedural requirements of U.S. law as stated in the ICCPR and Additional Protocol 1⁸ because they require the U.S.

⁵ See Common Art. 3 of the Geneva Conventions.

⁶ In its response to this defense motion and others, the government has espoused a position that the United States is involved in a “Global War” with al Qaida, or that because this is “wartime” that the government may invoke the LOAC to justify its treatment of Mr. Hicks. While the defense does not deny that combat operations have been ongoing on several fronts over the past 3-4 years, and that the United States has a right to defend itself under Art. 51 of the U.N. Charter, the terms “Global War,” “War on Terror,” or “wartime” are merely rhetorical or political devices that have no relevance to a legal discussion of the rules applicable to the military operations in which the United States has been involved. Any legal discussions of the LOAC and its implications must start with an analysis of what type of armed conflict, if any, is involved in a military operation, and what, if any rules under the LOAC are implicated by the armed conflict or lack thereof. Any discussion of “Global Wars” or “the War on Terrorism” merely serve to confuse and obfuscate the legal issues relevant to Mr. Hicks’, or any other, case before the commission.

⁷ Mr. Hicks could also have been tried by Australia for any violation of his law, or by the TISA for violations of its law.

⁸ The ICCPR and Additional Protocol 1 are part of U.S. law. The ICCPR has been adopted and ratified by the United States. The relevant article, Art. 75 of Additional Protocol 1 to the Geneva Conventions is considered by the U.S. to be customary international law, and thus, part of U.S. law. See Memorandum to

government to provide certain procedural rights, such as the right to a speedy trial, the right to be timely informed of the charges against him, the right to a timely arraignment, etc., and provides remedies for the accused if the government violates those procedural rights.

The government has chosen, instead, to try Mr. Hicks before a military commission. There is nothing in U.S. law that relieves this commission from the responsibility of providing the procedural safeguards required by U.S. law as stated in the ICCPR and Additional Protocol 1. The government has asserted that these laws do not apply, but as has been shown above, that position is incorrect. The guarantees of an accused's procedural safeguards at trial set forth in these treaties the U.S. has ratified apply to a military commission just as they do to trials in federal court or at a court-martial.

The government contends that these treaties are "not self-executing" and therefore do not create private rights enforceable in U.S. courts. It is true that a citizen may not use a government violation of the ICCPR as basis for a cause of action for damages, but that is not what Mr. Hicks is attempting to do. Mr. Hicks is simply asking the commission to formulate a remedy for the government's violation of procedural safeguards he is granted under U.S. law as stated in the ICCPR, just like he would get in any other criminal tribunal in the United States.

This commission, as a judicial body empowered to hear criminal matters, is just as bound by U.S. law, including the treaties and customary international law that Congress has ratified as the law of the land, as any other U.S. court or court-martial. In this case, the government has violated procedural safeguards for set forth in the law of the land, and this court has the obligation to examine those violations and issue a remedy.

The defense contends the remedy should be similar to that afforded in other U.S. courts. In a court-martial, having an accused confined without charges for almost two years would likely result in a dismissal of all charges. A similar remedy would likely be had in federal courts.

The commission has the power and duty to examine the actions of the government in this case, and formulate a remedy fitting the violations of the procedural rights afforded Mr. Hicks. The defense asks that it do so by dismissing all charges against Mr. Hicks, and releasing him from confinement.

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Mr. John H. McNiell, Assistant General Counsel (International). OSD, dated 9 May 1986, Subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications, pg. 2

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